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5 UNITED STATES DISTRICT COURT  
6 EASTERN DISTRICT OF WASHINGTON

7 UNITED STATES OF AMERICA,

8 Plaintiff,

9 v.

10 OSCAR MENDOZA (1),

11 Defendant.

12 NO: 1:10-CR-2091-RMP-1

13 ORDER DENYING DEFENDANT'S  
14 MOTION TO VACATE, SET ASIDE,  
15 OR CORRECT SENTENCE UNDER  
16 28 U.S.C. § 2255

17 BEFORE THE COURT are Defendant's Motion to Vacate, Set Aside, or

18 Correct Sentence under 28 U.S.C. § 2255, ECF No. 229, and Motion for Leave to

19 File Memorandum of Law in Support of the Same, ECF No. 230. The Court has

20 reviewed the motions and the record and is fully informed.

17 Defendant previously filed a Motion to Vacate, Set Aside, or Correct

18 Sentence under 28 U.S.C. § 2255, ECF No. 203, and the Court denied that motion.

19 See ECF No. 205. Defendant filed his present, successive petition on July 1, 2016.

20 ECF No. 229.

ORDER DENYING DEFENDANT'S MOTION TO VACATE, SET ASIDE, OR  
CORRECT SENTENCE UNDER 28 U.S.C. § 2255 ~ 1

1 Pursuant to 28 U.S.C. § 2255,

2 [a] second or successive motion must be certified as provided in section  
3 2244 by a panel of the appropriate court of appeals to contain--  
4 (1) newly discovered evidence that, if proven and viewed in light of the  
evidence as a whole, would be sufficient to establish by clear and  
convincing evidence that no reasonable factfinder would have found  
the movant guilty of the offense; or (2) a new rule of constitutional law,  
made retroactive to cases on collateral review by the Supreme Court,  
that was previously unavailable.

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6 The statutory reference to 28 U.S.C. § 2244 refers to the requirement that “[b]efore  
7 a second or successive application permitted by this section is filed in the district  
8 court, the applicant shall move in the appropriate court of appeals for an order  
9 authorizing the district court to consider the application.” 28 U.S.C. §  
10 2244(b)(3)(A).

11 Defendant filed his pro se motion with this Court without having moved in  
12 the Ninth Circuit Court of Appeals. Therefore, this Court is without jurisdiction to  
13 consider his arguments. Accordingly, Defendant’s request for leave to file a  
14 memorandum of support must also be denied.

15 **Certificate of Appealability**

16 An appeal of this Order may not be taken unless a circuit justice or judge  
17 issues a certificate of appealability (COA). 28 U.S.C. § 2253. The Court may only  
18 issue a COA “if the applicant has made a substantial showing of the denial of a  
19 constitutional right.” *Id.* The U.S. Supreme Court held that  
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1 when the district court denies a habeas petition on procedural grounds  
 2 without reaching the prisoner's underlying constitutional claim, a COA  
 3 should issue (and an appeal of the district court's order may be taken)  
 4 if the prisoner shows, at least, that jurists of reason would find it  
 5 debatable whether the petition states a valid claim of the denial of a  
 6 constitutional right, and that jurists of reason would find it debatable  
 7 whether the district court was correct in its procedural ruling.

8 *Slack v. McDaniel*, 529 U.S. 473, 478 (2000).

9 Defendant has failed to provide reason to believe that any jurist of reason  
 10 would find that his petition is not "second or successive" and that he has failed to  
 11 move in the Ninth Circuit Court of Appeals. His brief motion also fails to provide  
 12 the Court with cause to find the denial of a constitutional right, as he recognizes  
 13 that he requires more time "[t]o determine whether or not I may be eligible for a  
 14 sentence reduction upon the *Johnson* decision . . ." Letter to Judge Peterson at 2,  
 15 ECF No. 229-1. The Court finds no basis to issue a certificate of appealability.

16 In addition, the Court notes that Defendant bases this subsequent § 2255  
 17 motion on the Supreme Court's decision in *Johnson v. United States*, 135 S.Ct.  
 18 2551 (June 26, 2015). Even if the Court were to have jurisdiction over  
 19 Defendant's current § 2255 motion, which the Court finds that it does not, the  
 20 Court finds that *Johnson* is not applicable in Defendant's situation. In *Johnson*, the  
 Supreme Court held that the residual clause of the Armed Career Criminal Act  
 (ACCA) was unconstitutionally vague in violation of the Due Process Clause of  
 the Fifth Amendment to the U.S. Constitution. *Id.* at 2557. However, Mr.

1 Mendoza was not subject to the Armed Career Criminal Act and the residual clause  
2 constituted no part of this Court's sentencing decisions. Therefore, nothing about  
3 *Johnson* is applicable to this case and its holding cannot be a basis for this Court to  
4 resentence Defendant.

5 Accordingly, **IT IS HEREBY ORDERED:**

6 1. Defendant's Motion to Vacate, Set Aside, or Correct Sentence under 28  
7 U.S.C. § 2255, **ECF No. 229**, is **DENIED**.

8 2. Defendant's Motion for Leave to File Memorandum of Law in Support of  
9 the Same, **ECF No. 230**, is **DENIED**.

10 The District Court Clerk is directed to enter this Order and provide copies to  
11 counsel and pro se Defendant.

12 **DATED** this 31st day of October 2016.

13 *s/ Rosanna Malouf Peterson*  
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ROSANNA MALOUF PETERSON  
15 United States District Judge  
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